Petition

81-1414

No.

Office - Supreme Court, U.S.
FILED
JAN 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HOSKINS,
Petitioner

V.

JULIUS T. CUYLER, SUPT.,
ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioner
William Hoskins

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QUESTION PRESENTED

Whether a retrial of petitioner will violate the Double Jeopardy Clause where the Supreme Court of Pennsylvania reversed petitioner's conviction due to prolonged intentional misconduct by the prosecutor which created an extremely prejudicial trial atmosphere and deprived petitioner of his right to a verdict by a fair and unbiased jury?

PARTIES TO THE PROCEEDING

The caption of the case contains the name of the parties to the proceeding in this Court.

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OPINIONS BELOW

The Judgment Order dated December 1, 1981 of the United States Court of Appeals for the Third Circuit below is not yet reported. A copy of the Judgment Order is contained in the separate Appendix and marked Appendix "E". The Order dated May 8, 1981 of the United States District Court for the Eastern District of Pennsylvania

Approving and Adopting the Report of the United States Magistrate and the Report and Recommendation of the Magistrate are not yet reported and are contained in the Separate Appendix and marked Appendix "C" and Appendix "D". The Judgment, Order and various Opinions of the Supreme Court of Pennsylvania all dated February 4, 1981, are reported at 432 A.2d 149 and contained in the Appendix as Appendix "B". The Opinion dated April 25, 1980 of the Court of Common Pleas of Philadelphia County is not yet reported and is contained in the Appendix and marked Appendix "A".

STATEMENT OF JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit below was filed on December 1, 1981. (Appendix "E") The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Ammendment to the Constitution of the United States provides in pertinent part:

"...nor shall any person by subject for the same offense to be twice put in jeopardy of life or limb..."

STATEMENT OF THE CASE

This is a petition for Writ of Certiorari to the Third Circuit Court of Appeals challenging the denial of petitioner's Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. In the Petition, Mr. Hoskins claimed that a retrial would subject him to double jeopardy in violation of the Fifth Amendment to the United States Constitution.

Petitioner, William Hoskins, was originally tried in the Court of Common Pleas of Philadelphia County before a jury from May 5, 1976 to May 11, 1976. He was found guilty on May 11, 1976 of murder in the first degree; of possessing instruments of crime generally and possessing prohibited offensive weapons; and of criminal conspiracy.

Petitioner then filed a timely appeal to the Supreme Court of Pennsylvania as of January

Term, 1977, Nos. 176 and 237. On July 5, 1979 that Court reversed the judgments of sentence and awarded Mr. Hoskins a new trial due to the misconduct pursued by the assistant district attorney during trial when the defense was presenting its case. Commonwealth v. Hoskins, 402 A.2d 521 (Pa. Supreme 1979). In addition, the charge of possessing prohibited offensive weaponse was dismissed due to insufficiency of the evidence.

Following a remand to the Court of Common Pleas of Philadelphia County, petitioner filed a Motion to Dismiss the Indictments on the grounds, inter alia, that a retrial would subject him to double jeopardy. On December 17, 1979, the Court of Common Pleas denied this Motion. Petitioner then filed a timely appeal to the Supreme Court of Pennsylvania where the appeal was docketed as of No. 80-3-361.

On February 4, 1981, the decision of December 17, 1979 of the Court of Common Pleas denying the Motion to Dismiss the Indictments was affirmed by an equally divided Supreme Court

of Pennsylvania. On March 13, 1981, petitioner's Application for Reargument was denied.

On March 25, 1981, petitioner filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 with the United States District Court for the Eastern District of Pennsylvania on the grounds that a retrial would subject him to double jeopardy. By Order dated May 8, 1981, the District Court denied the Petition for a Writ of Habeas Corpus. On December 1, 1981, the Third Circuit Court of Appeals affirmed the Order of May 8, 1981.

The following facts form the basis of petitioner's claim that a retrial would subject him to double jeopardy:

In petitioner's initial appeal of his convictions the Supreme Court of Pennsylvania thoroughly analyzed the trial evidence against petitioner and concluded that, considering the direct and circumstantial evidence in the light most favorable to the Commonwealth, there was sufficient evidence to support the convictions of murder in the first degree, possessing in-

struments of crime generally and criminal conspiracy. This conclusion was reached even though no Commonwealth witness identified Mr. Hoskins as one of the two males who fired the gunshots at the deceased, Herschell Williams.

It was during the defense case that the experienced prosecutor engaged in intentional misconduct. Recognizing that the case against petitioner was substantially circumstantial and that the presence of Rene Williams, as an alibi witness, who was the sister of the deceased victim, Herschell Williams, coupled with the potential testimony of the defendant himself, would cast a reasonable doubt about guilt, the district attorney then engaged in a calculated course of misconduct aimed at goading the defense into moving for a mistrial or creating in the minds of the jury bias and hostility toward petitioner and, thus, preventing an objective verdict.

This was especially evident when the district attorney intentionally and improperly questioned Rene Williams and petitioner concerning drug-

trafficking and the "Muslim" religion, two issues which never became relevant for the jury's consideration. Despite the lack of evidence that the motive for the slaying was drug related or had anything to do with any established religion, the prosecutor persistently interrogated Rene Williams on cross-examination as follows:

"Q. (DISTRICT ATTORNEY DE SIMONE) Now, your brother Herschell Williams was selling drugs, wasn't he:

MR. DENKER (DEFENSE COUNSEL): Objection.

A. My - -

Q. If you know. Wasn't your brother Herschell Williams selling drugs? If you know?

A. Yes, he was.

Q. Okay. And, you know about that, didn't you?

A. Yes, I did.

Q. And, by the way, do you belong to the same religion that he belongs to, the Nation of Islam?

MR. DENKER: Objection. Where is the relevancy of that in this case?

THE COURT: Yes. Objection sustained.

MR. DE SIMONE: Okay.

A. The Nation of Islam? My brother was never - -

THE COURT: The objection was sustained. Which means you do not have to answer the question.

Q. Your brother wasn't a member of the Nation of Islam, is that you you are telling this jury?

MR. DENKER: I renew my objection.

MR. DE SIMONE: Judge, this is the deceased's sister.

THE COURT: Yes. Overruled.

Q. Your brother wasn't a member of the --

THE COURT: If she knows.

Q. Your brother was not a member of the Muslims, is that what you are telling the jury?

A. I don't know..

Q. Pardon me?

A. Not to my knowledge?

Q. Well, Mr. Hoskins and your brother were close friends, weren't they?

A. Yes, they were.

Q. And when your brother sold drugs, was Mr. Hoskins ever present when that happened?

MR. DENKER: Objection.

THE COURT: Ever? You may be going

back too far, counsel.

Q. Well, within the last three months --

A. No.

Q. - - prior to his death.

A. I don't even know a drug transaction was being made with my brother, number one. I admit that he was involved in drug traffic. He sold drugs, yes. Now, his business transactions, who they were with, I do not know.

Q. How did you know your brother was selling drugs?

A. He's my brother.

Q. How do you know he was selling drugs?

A. I only know what the authorities accused him of, what he was found convicted of from before.

Q. You're not saying that he sold drugs now; is that right? You're just saying it because the authorities accused him of doing that?

A. What do you mean? By selling drugs on the corner one by one, is that what your're trying to say?

Q. I mean selling drugs to little kids, to big people, to everybody. He was a drug salesman, wasn't he?

MR. DENKER: Objection, Your Honor.

THE COURT: If she knows. Overruled.

A. I wouldn't know that, Your Honor.

Q. Now, you don't know if he was selling

drugs.

A. I said I admit my brother sold drugs. To whom he sold them to, I do not know.

Q. Did you ever see your brother, your brother selling drugs to anybody?

A. No.

Q. But he told you he sold drugs?

MR. DENKER: Objection as to what her brother told her.

THE COURT: Objection sustained.

Q. Well, then, how do you know your brother sold drugs?

A. As I said before, I only know by his past convictions.

Q. Did you ever go to Court when your brother was on trial.

A. Not for drugs?

Q. And, do you know why your brother got killed? It was over drugs, wasn't it?

A. I did not know why.

Q. You didn't inquire about that from anyone?

MR. DENKER: From anyone. Objection, Your Honor.

THE COURT: Did she inquire about it? Overruled. If she can answer yes or no.

A. It was - - It's a topic I never cared

to ask anybody about.

Q. Well, didn't your brother tell you, or weren't you aware that prior to your brother's death that the Muslims were looking for your brother?

MR. DENKER: Now, that objectionable.

A. No.

THE COURT: Objection sustained.

MR. DENKER: I ask that it be stricken.

THE COURT: Objection sustained. It shall be stricken.

Q. Wasn't your brother wearing a bullet-proof vest for a while because he was afraid of getting killed?

MR. DENKER: That's objectionable too.

THE COURT: If she knows.

MR. DE SIMONE: If she knows. She was close to her brother.

THE COURT: Overruled.

A. I don't know anything about him wearing a bullet-proof vest.

Q. You don't know anything about your brother's bullet-proof vest that he used to wear?

A. In '69?

Q. Well, whenever. Are you aware that he had a bullet-proof vest?

A. Yes, in 1969.

Q. How about the day he was shot? Were

you aware in his house there were bullet-proof vests? Were you aware of that?

MR. DENKER: Objection.

THE COURT: She can answer yes or no if she was aware of it.

A. No.

Q. You weren't. Have you ever been to your brother's house prior to November 5th?

A. Yes.

Q. When was the last time you were there prior to November 5th?

A. November 4th.

Q. And, did he express any concern about being killed?

MR. DENKER: Objection.

THE COURT: She can answer yes or no. Overruled.

A. No.

Q. All right, and, how do you know Mr. Hoskins?

A. He is a friend - - was a friend of my brother's.

Q. Well, how do you know?

A. I saw them in company in my brother's business and places together.

Q. What kind of business did your brother have?

A. B&H Delicatessen.

Q. What do they serve at the B&H Delicatessen?

A. Seafood and deli-products.

Q. Isn't that owned by the Nation of Islam?

A. No, it's not.

* * *

"Q. (DISTRICT ATTORNEY DE SIMONE) Now, your mother is not selling drugs now, is she?

MR. DENKER: Now, Your Honor - -

THE COURT: Objection sustained.

MR. DENKER: Your Honor, this gets to - - what kind of a question is that?

THE COURT: Objection sustained, counsel.

Q. How about you?

A. My mother worked every day. She's always worked. She's never sold drugs.

Q, She loved her son, didn't she?

A. She gave birth to him.

Q. She won't come down here in court; isn't that right?

MR. DENKER: Objection. How does she know?

THE COURT: Mr. DeSimone, I've already sustained an objection to that line of

questioning.

* * *

Q. (DISTRICT ATTORNEY DE SIMONE) How close were you to your brother?

A I was with him on November 4th.

Q. How close were you to him?

A. Very close.

Q. A close relationship?

A. Close as could possibly be for a full-grown man with his family and with mine.

Q. You don't know whether or not, or are you saying he wasn't a member of the Nation of Islam? Is that what you are saying?

MR. DENKER: Objection. That's been testified to, Your Honor.

MR. DE SIMONE: Judge - -

THE COURT: Overruled as to that that.

Q. You are saying he wasn't?

THE COURT: If she knows whether her brother was a member of the Nation of Islam.

THE WITNESS: Your Honor - -

THE COURT: Do you know? Yes or no.

THE WITNESS: No.

THE COURT: Let's move on.

* * *

Q. (DISTRICT ATTORNEY DE SIMONE) All right. What relationship did Mr. Hoskins have with your brother?

MR. DENKER: If any.

MR. DE SIMONE: Judge, if Mr. Denker wants to testify, he can testify.

THE COURT: Yes, you will have a chance on redirect. She can answer the question.

A. I don't know what type of relationship it was.

q. Well, how did they know each other?

A. I don't know that either. I told you he was a grown man with friends of his own.

Q. You were close to your brother, as close as anybody could be.

A. That's right.

Q. Ever talk about Roy Hoskins?

A. No.

Q. Never mentioned him at all?

A. Of course in general conversation.

Q. Now were they friends?

A. I don't know what caused them to be friends.

Q. Were they business friends?

A. What type of business friends?

Q. I don't know. You tell us.

A. In his business. In the delicatessen business.

Q. How about the other business your brother was in?

A. I don't know about that business. I told you that before.

Q. He was selling drugs out of his house, wasn't he, your brother?

A. Out of his house?

MR. DENKER: Objection.

THE COURT: Yes. Objection sustained. It is repetitious, counsel.

MR. DE SIMONE: If she knows, Your Honor.

THE COURT: We have already gone over this area.

Q. Well, do you know if he was selling drugs out of his house, your brother?

A. No.

Q. He never discussed that business with you, is that what you are telling the jury?

A. That's right."

During this cross-examination of Rene Williams, the prosecutor not only engaged in intentional misconduct but also consciously and blatantly disregarded the rulings of the trial

judge. As a result of the prosecutor's continuous disregard for the court's rulings, the trial judge admonished: "Mr. DeSimone, I've already sustained an objection to that line of questioning."

The prosecutor's inflammatory tactics worsened during the cross-examination of petitioner. In addition to improperly and intentionally highlighting drug-trafficking and the "Muslim" religion, the prosecutor also referred to unrelated homicides in an attempt to scare the jury into convicting. During petitioner's cross-examination, the prosecutor failed to show the relevancy of such questioning despite instructions from the trial judge to do so. The following occurred at trial:

"Q. (DISTRICT ATTORNEY DE SIMONE) Good afternoon, Mr. Hoskins. Mr. Hoskins, would you tell this jury if you know a man by the name of Lt. Muhammed Walida?

MR. DENKER: Objection.

A. Who?

Q. Do you know a man by that name?

MR. DENKER: Objection.

THE COURT: You have to show me the relevancy, counsel.

MR. DE SIMONE: It's him, Judge.

Q. Do you know a man by the name of Lt. Muhammed Walida?

THE COURT: Were you known by that name?

THE DEFENDANT: Not by that name.

Q. What name were you known by?

MR. DENKER: Objection, What does - -

THE COURT: Overruled. You still have to show some relevancy. You can move to strike it later if it is not shown. You may answer the question.

Q. What name are you known by?

A. Muhammad Walideen.

Q. I'm sorry. Lieutenant, right?

A. No.

Q. And you belong to Temple Twelve?

MR. DENKER: I'm going to renew my objection.

MR. DE SIMONE: Mr. Williams belonged to Temple Twelve. That's relevant.

THE COURT: Overruled, for the moment. However, you may remake your objection - -

MR. DENKER: Thank you.

THE COURT: - - if there is no rel-

levancy and you can move to strike it counsel. I will let him answer the question.

Q. You belong to Temple Twelve, don't you?

A. Yes, sir.

Q. And how many people belong to Temple Twelve?

MR. DENKER: Objection.

THE COURT: Yes. I will sustain the objection as to how many people.

Q. You're a Muslim. Temple Twelve is from the Nation of Islam; isn't that correct?

A. That's right.

MR. DENKER: What religion?

THE COURT: Just make your objection.

MR. DENKER: Objection.

THE COURT: I am overruling it at this time. If he does not show the relevancy, remake your objection after he has finished this line of questioning and at that time if it is not relevant I am going to sustain your motion.

* * *

"Q. (DISTRICT ATTORNEY DE SIMONE) You didn't know Herschell Williams was a member of Temple Twelve?

A. No, I didn't.

* * *

"Q. And, you went outside and you saw Rene Williams, is that right?

A. She was pulling up.

Q. By the way, you know who her common-law husband is.

A. What?

Q. You know Robert Blair, don't you, her common-law husband?

MR. DENKER: Objection, Your Honor.

THE COURT: Overruled.

Q. You know Robert Blair, don't you?

A. I know Blair.

Q. That's Rene Williams' common-law husband, right?

A. I don't know.

Q. You never saw them together?

A. Yes, I have saw them together.

Q. And you know that Robert Blair is in the drug business, don't you. Don't you?

A. No, I don't.

MR. DENKER: Objection.

THE COURT: Yes.

MR. DENKER: I move that be stricken and move for a mistrial.

THE COURT: Objection sustained.

MR. DE SIMONE: Judge --

MR. DENKER: I move for a mistrial.

THE COURT: Objection sustained. It shall be stricken. The jury will disregard it.

Q. Anyway, you know that Robert Blair sold a Lincoln Continental to Mr. Hoskins -- or a Continental to Herschell Williams, don't you?

A. No.

MR. DENKER: Objection.

Q. You didn't know that?

A. No.

MR. DENKER: What has that got to do with this case?

THE COURT: Well - -

MR. DE SIMONE: I'll tie it in, Your Honor.

MR. DENKER: Objection.

BY MR. DE SIMONE:

Q. You know that Mr. Blair and Mr. Williams, had a little shoot-out over that, don't you?

MR. DENKER: Objection.

A. No.

THE COURT: Does he know that?

MR. DE SIMONE: Yes, does he know that.

THE COURT: You may answer the question.

Q. You weren't aware of that?

A. No.

Q. You weren't aware that Mr. Williams shot at Mr. Blair?

MR. DENKER: Objection.

A. No.

* * *

"Q. (DISTRICT ATTORNEY DE SIMONE) This Calvin Tilghman, his son whom you grew up with, was a good friend of yours, wasn't he?

A. That's right.

Q. Tell the jury what happened to him, your good friend.

MR. DENKER: Objection. This is totally irrelevant.

THE COURT: Are you making an objection?

MR. DENKER: Absolutely.

THE COURT: It is sustained.

MR. DE SIMONE: Well, Judge, it is relevant.

THE COURT: It is sustained.

Q. Well, he was killed, wasn't he?

MR. DENKER: Objection.

THE COURT? Who? I don't know who "he" is.

Q. Calvin Tilghman's son was killed.

THE COURT: Objection to the question.

MR. DE SIMONE: Judge --

THE COURT: The jury will disregard it. We are trying one case.

MR. DE SIMONE: We are, Judge. It might be relevant as to why Calvin Tilghman's son was killed.

THE COURT: When I sustain an objection you will not ask other questions in that area.

* * *

"Q. (DISTRICT ATTORNEY DE SIMONE) Were you aware -- by the way, were you aware Herschell Williams was selling narcotics?

A. No.

Q. You knew him for four years?

A. Yeah.

Q. Were you aware that he was arrested for selling narcotics, or were you oblivious to that?

MR. DENKER: I object to the characterization.

THE COURT: Yes. Rephrase your question.

Q. Were you aware that he was arrested for selling narcotics?

A. No, I can't say I was."

During his closing argument, the prosecutor argued matters not supported by the evidence, made inflammatory comments, and gave his personal opinion as to guilt, thereby creating malice and prejudice towards petitioner in the minds of the jurors. Despite a warning by the trial judge that "Counsel may not deliberately mistate evidence," the prosecutor presented the arguments which were merely inflammatory rhetoric or had no evidentiary basis whatsoever.

It is the sheer magnitude of intentional prosecutorial misconduct and overreaching infesting the record to which this petition is addressed.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

A. The Court of Appeals Below Has Decided A Constitutional Question In Conflict With Applicable Decisions of This Court and In Conflict with Decisions of Other Federal Courts of Appeals.

The Double Jeopardy Clause of the Fifth

Amendment is designed to protect a defendant in a criminal case against multiple punishment or repeated prosecutions for the same offense. The doctrine of double jeopardy was applied to the states via the Fourteenth Ammendment in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Underlying this constitutional safeguard is the belief that:

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187085 (1957)

The Double Jeopardy Clause protects a defendant against governmental action intended to provoke mistrial requests and thereby to subject a defendant to substantial burdens imposed by multiple prosecution. United States v. Jorn, 400 U.S. 470, 485 (1971), Downum v. United States, 372 U.S. 734, 736 (1963), United States v. Dinitz, 424 U.S. 600, 611 (1976).

This Court has consistently held that the Double Joepardy Clause bars a retrial when the defense requests and obtains a mistrial as a result of prosecutorial overreaching during the trial. United States v. Dinitz, supra; United States v. Lee, 423 U.S. 23 (1977). This court has formulated two standards to determine prosecutorial overreaching. First, there is overreaching if the court or prosecutor goads the respondent into requesting a mistrial in order to secure another and more favorable opportunity to convict. Second, there is overreaching if the prosecutorial misconduct is undertaken to "harass or prejudice the respondent." United States v. Dinitz, supra.

The Federal Circuit Courts of Appeals have vered from these two standards and have elected to apply their own tests which are in conflict with each other and with those set by this Court. The Fifth Circuit in United States v. Kessler, 530 F.2d 1246 (1976) and United States v. Crouch, 566 F.2d 1118, 1318, n. 9 (1978) held that prosecutorial overreaching includes a

finding of gross negligence or intentional misconduct on the part of the government. The gross negligence standard for precluding retrial has also been adopted by the Eighth Circuit Court of Appeals in United States v. Martin, 561 F.2d 135, 140 (1977), where the court held:

> "...If the government's actions in reading this testimony to the jury were not intentionally designed to provoke a mistrial request, at the minimum they constitute gross negligence. It can best be described as prosecutorial error undertaken to harass or prejudice the defendant — prosecutorial overreaching."

Different standards have been promulgated by the Third Circuit and even by the Supreme Court of Pennsylvania. In United States v. Leppo, 641 F.2d 149, 153 (3d Cir. 1981), the court held that "a new trial is barred only if the mistrial was occasioned by 'intentional misconduct by the Court or prosecution.'" Moreover, in an equally divided Supreme Court of Pennsylvania in this case, the standard for prosecutorial overreaching was whether the mistrial was deliberately provoked or whether the prosecutor acted in bad faith.

Thus, there is confusion between and within the circuits and even in Pennsylvania as to which standard to apply to protect a defendant's rights against being placed in double jeopardy. It is imperative for this Court to set forth the appropriate standard which all courts should apply to make certain that all defendants faced with the possibility of repeated prosecutions for the same offense are treated equally.

Regardless of which standard is applied here to determine the presence of prosecutorial misconduct and overreaching, the record clearly shows that the prosecutor blatantly and deliberately overreached in his persistent efforts to harass and prejudice Mr. Hoskins and to provoke him into requesting a mistrial. The prosecutor here intended to sabotage the trial when he noted that the distinct possibility of a not guilty verdict existed.

Prosecutorial or judicial overreaching designed to prevent an acquittal, and motivated by the fear of an acquittal, was condemned in United States v. Tateo, 377 U.S. 463, 468 n.3,

where the Court stated:

> "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would of course, obtain."

In the instant case, the experienced assistant district attorney engaged in intentional misconduct and overreaching because he feared that the jury would acquit based upon weaknesses in the Commonwealth's case-in-chief and the strength of the defense case with the deceased's sister as an alibi witness. No witness identified petitioner as one of the assailants. A confession allegedly given by petitioner was ordered suppressed because Mr. Hoskins was severly beaten by the police. The Commonwealth's case at trial consisted essentially of testimony of three witnesses who identified petitioner as being near the scene of the slaying, along with circumstantial evidence as to the similarity of clothing worn by the assailant and petitioner.

When Rene Williams, the victim's sister, testified as an alibi witness and the petitioner testified on his own behalf, the district attorney obviously realized his case to the jury was in serious jeopardy. Therefore, he cross-examined the deceased's sister and petitioner in a manner that was calculated to goad the petitioner into seeking a mistrial.

The district attorney intentionally and improperly interrogated alibi witness, Rene Williams, about the "Muslim" religion and drug-trafficking, issues which were not relevant to this case. The prosecution defiantly disregarded the rulings of the trial judge and proceeded to question the witness after numerous objections by defense counsel were sustained.

Furthermore, the prosecutor made arguments to the jury calculated to frighten the jury into convicting. The prosecutor referred to unrelated shootouts and killings in an attempt to scare the jury into convicting. Not once did the prosecution show the relevancy of such testimony. "Continued prosecutorial misconduct

may show a course of conduct establishing the intent to provoke a mistrial and bring into play double jeopardy consideration." United States v. Roberts, 640 F.2d 225, 227 (9th Cir. 1981).

On October 31, 1981, this Honorable Court granted certiorari in Oregon v. Kennedy, 619 P.2d 948 (1980) to determine whether the Double Jeopardy Clause bars a retrial of a criminal defendant when a mistrial is granted on the defendant's motion based on the prosecutor's improperly phrased question, which is prejudicial to defendant but is allegedly asked in good faith and without intent to provoke a mistrial.

The Court of Appeals of Oregon held that the district attorney's redirect examination of the prosecution's witness as to whether the reason the witness did not do business with the defendant was because the defendant was a crook amounted to a personal attack on the character of the defendant made intentionally to prejudice the jury and went beyond rehabilitation of the

witness. The defendant successfully moved for a mistrial. The appellate court found this conduct by the prosecutor reached the level of prosecutorial overreaching. The defendant's conviction was reversed and the case ordered discharged.

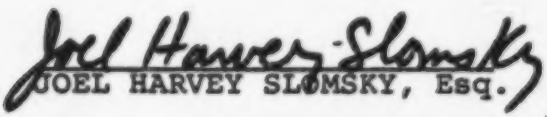
The decision to be rendered by this Honorable Court on the constitutional issue raised in Oregon v. Kennedy, supra will effect the determination of this case. Your Honorable Court should consider this case in tandum with Oregon v. Kennedy, supra. It also is imperative for this Honorable Court to resolve the conflicting standards in regard to the applicability of the double jeopardy bar.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a Writ of Certiorari should be issued to review the decision of

the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,



JOEL HARVEY SLOMSKY, Esq.

Attorney for Petitioner
William Hoskins

Appendix

81-1414

Office - Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HOSKINS,
Petitioner

V.

JULIUS T. CUYLER, SUPT.,
ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioner
William Hoskins

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FOR A WRIT OF CERTIORARI

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3. Appendix "C" - Order dated May 8, 1981 of the United States District Court for the Eastern District of Pennsylvania Approving and Adopting Report of U.S. Magistrate

4. Appendix "D" - Report and Recommendation dated May 8, 1981 of U.S. Magistrate

5. Appendix "E" - Judgment Order of the United States Court of Appeals for the Third Circuit

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

COMMONWEALTH OF PA	:	CRIMINAL DIVISION
	:	
V.	:	NOVEMBER TERM, 1975
	:	
WILLIAM HOSKINS	:	NOS. 2753-2755

OPINION OF THE COURT

This case comes before the court following a reversal by the Supreme Court of Pennsylvania of defendant's 1976 conviction of murder in the first degree, etc. See Commonwealth v. Hoskins, Pa., 403 A.2d 521 (1979). The 1976 trial was not held before this court, Defendant, by his counsel, has filed a motion with this court asking that the above captioned indictments be dismissed because a retrial would offend the constitutional prohibition against "double jeopardy."

Defendant's principal contention in support of his motion is that prosecutor misconduct at his 1976 trial was intentional and designed to secure a mistrial so that the issue of his guilt or innocence could be weighed in a possibly more

favorable forum. See Commonwealth v. Gravely, Pa., 404 A.2d 1296, 1298-1299 (1979), and cases discussed therein. The court has carefully considered defendant's position and finds it to be without merit.

Essentially, appellant contends that this court should infer, from a pattern of alleged efforts by the prosecutor to inject prejudice in the trial, that the prosecutor intended to abort the trial. This view cannot be sustained by the record. In this connection, it is appropriate to review the Supreme Court's consideration of this case on direct appeal. The record discloses that the defendant moved for a mistrial on only one occasion which was germane to the Supreme Court's review of the case. (Hoskins at page 526). On those other occasions claimed now by defendant to support a pattern of government misconduct, no motion for a mistrial was ever made. Apparently, trial counsel was content with the relief obtained from the trial court at the time; namely, that his objection was sustained and a motion to strike granted.

Nevertheless, the Supreme Court relying on Commonwealth v. Perillo, Pa., 376 A.2d 635 (1977), concluded that the "atmosphere of the trial," created by the prior objectionable questions propounded by the prosecutor, was such that the question which prompted the motion for a mistrial had the "unavoidable effect" of jury prejudice requiring a new trial. As Mr. Justice Nix observed in a dissent from the plurality opinion,[1] Mr. Hoskins was granted relief by the Supreme Court which he did not seek from the trial Court. (Hoskins at page 529).

The posture of the matter before the court instantly is dramatically different. The court is not here presented with a record which demonstrates a series of mistrial motions prompted by alleged prosecutor misconduct. In this context, the defendant never ventilated, before the trial court, the concerns now expressed. In the absence of mistrial requests or any in-

---

[1] The opinion of Chief Justice Eagen was joined by Mr. Justice O'Brien and Mr. Justice Roberts. Mr. Justice Mandarino did not participate in the case. Mr. Justice Larsen concurred only in the result. Mr. Justice Nix dissented.

dication on the record that the objectionable questions by the prosecutor were efforts to force defendant's counsel to move for a mistrial, this court holds that such matters are not now grounds for dismissal of the instant indictments.

This court has also carefully considered the merits of defendant's contentions and finds absolutely no basis to infer prosecutor misconduct which would justify imposing a bar to retrial.

Accordingly, the motion to dismiss was denied.

BY THE COURT:

/s/
RIBNER, J.

April 25, 1980

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PA	:	NO. 80-3-361
V.	:	
WILLIAM HOSKINS, Appellant	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the Court of COMMON PLEAS, CRIMINAL DIVISION of PHILADELPHIA COUNTY, be, and the same is hereby AFFIRMED BY AN EQUALLY DIVIDED COURT.

BY THE COURT:

/s/
Carl Rice, Esquire
Prothonotary

Dated: February 4, 1981

Appendix "B"

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PA	:	No. 80-3-361
	:	
	:	Appeal from the Order
	:	of the Court of Common
	:	Pleas of Philadelphia,
V.	:	Criminal Trial Division,
	:	at Nos. 2753, 2754 and
	:	2755 November Term,
	:	1975, dated December
	:	17, 1979.
WILLIAM HOSKINS,	:	
Appellant	:	ARGUED: October 23, 1980

O R D E R

PER CURIAM:

The Court being equally divided, the order of the Court of Common Pleas of Philadelphia is affirmed.

Mr. Justice Nix files an Opinion in Support of Affirmance.

Mr. Justice Kauffman files an Opinion in Support of Affirmance.

Mr. Justice Larsen would affirm.

Mr. Justice Roberts files an Opinion in Support of Reversal, in which Chief Justice O'Brien and Mr. Justice Flaherty join.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PA	:	No. 80-3-361
	:	
	:	Appeal from the Order
	:	of the Court of Com-
	:	mon Pleas of Phila-
V.	:	delphia, Criminal Trial
	:	Division, at Nos. 2753,
	:	2754 and 2755 November
	:	Term, 1975, dated
	:	December 17, 1979.
WILLIAM HOSKINS,	:	
Appellant	:	ARGUED: October 23, 1980

OPINION IN SUPPORT OF REVERSAL

ROBERTS, J.

At appellant William Hoskins' jury trial, the prosecuting attorney over defense objection repeatedly questioned both appellant's alibi witness and appellant himself on wholly irrelevant, inflammatory matters, frequently in deliberate disregard of rulings of the trial court. An example of the objectionable misconduct is the following question, put to appellant: "And you know that Robert Blair [(common-law husband of appellant's alibi witness)] is in the drug business, don't you? Don't you?" This

Court held that appellant's request for a mistrial immediately following this improper question should have been granted because of the prosecutor's misconduct. 485 Pa. 542, 403 A.2d 521 (1979). Speaking for the Court, Chief Justice Eagen concluded:

> "The 'atmosphere of the trial' was such that the 'unavoidable effect' of the improper and inflammatory leading question pertaining to Blair's drug activities was to form in the minds of the jury bias and hostility toward Hoskins and thus prevent an objective verdict."

485 Pa. at 556, 403 A.2d at 528, quoting Commonwealth v. Stoltzfus, 462 Pa. 43, 61, 337 A.2d 873, 882 (1975).

This is an appeal pursuant to Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977), from an order of the Court of Common Pleas of Philadelphia denying appellant's pre-retrial motion to dismiss indictments on the ground of double jeopardy. At issue is whether the prosecutorial misconduct at appellant's jury trial constituted "overreaching" which bars appellant's retrial. The present record is clear that the prosecutor, who not only sought to inject irrelevant, in-

flammatory matters into the trial but also, on more than one occasion, deliberately ignored rulings of the trial court, engaged in over-reaching. Hence the order must be reversed.

I

Appellant is charged with criminal homicide, conspiracy, and various firearms offenses. The alleged homicide occurred on November 5, 1975, at approximately 12:30 p.m., in the 8600 block of Bayard Street, Philadelphia. The victim, Herchell Williams, was shot several times and killed by two men shortly after leaving his home.

Police arrived at the scene shortly after the killing. Based on interviews with a neighbor of the victim and a friend of the neighbor, police issued a radio broadcast containing a description of a green Cadillac and "suspicious" persons seen in the neighborhood moments before the shooting. Appellant and two companions, Lonnie Dawson and Joseph Rhone, were stopped approximately one-half hour later, at about 1:15

p.m., while riding on the Schuylkill Expressway, in a green Cadillac belonging to appellant's employer, Calvin Tilghman.

Appellant and his companions were returned to the scene of the shooting. The record, however, contains no indication that persons in the neighborhood could identify either appellant or the two other suspects. The Commonwealth nonetheless proceeded against appellant on the theory that appellant was one of the two men who had fired the fatal shots.

Although a Philadelphia police officer had obtained inculpatory statements from appellant, appellant successfully moved before trial to suppress the inculpatory statements on the ground that the police officer had beaten appellant at the time the statements were obtained. The Commonwealth did not challenge the suppression court's ruling. See Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963).

At trial, the Commonwealth's sole eyewitness did not implicate appellant. The eyewitness testified only that two men, coming from

different directions on Bayard Street, approached the victim and "just started shooting on him." Thus the Commonwealth's case-in-chief was based solely upon circumstantial evidence.

Frederick Robb, resident of Bayard Street, and Daniel Parks, friend of Robb, testified for the Commonwealth that appellant was standing on or near Bayard Street within moments of the shooting. On cross-examination, however, this circumstantial evidence was substantially weakened. Most significantly, defense counsel established that, when police had returned to the scene on the afternoon of the shooting with appellant, neither Robb nor Parks had identified appellant as one of the "suspicious" men they had previously seen. Also identifying appellant at trial was Nazie Cook, a neighborhood resident, who testified that, about 12:15 p.m. of the day of the shooting, she encountered appellant driving a green Cadillac with two other occupants. However, while previous Commonwealth witnesses had consistently testified that appellant had been wearing an unusual hat, Cook on cross-examination had no such recollection.

After appellant had unsuccessfully demurred to the Commonwealth's circumstantial evidence, appellant proceeded to present the alibi that he was in a different part of the city at the time of the shooting. Testifying on appellant's behalf was Rene Williams, sister of the victim. Williams maintained that she had seen appellant in front of the "Unusual Gift Store" at 41 S. 40th Street at "12:15, 12:20. 12:25 the latest." According to Williams, appellant assisted her in delivering a package of silver coins to the gift store. Williams added that she was "very close" to her brother.

The prosecutor's misconduct began on cross-examination of Williams. The prosecutor engaged in a wide-ranging inquiry prompting numerous defense objections, several of which were sustained by the trial court. Included among those inquiries to which the court sustained defense objections were questions relating to (1) the alleged refusal of the witness' mother to visit the district attorney's office, (2) the witness's membership in the "Nation of Islam,"

(3) the witness's alleged awareness that, prior to her brother's death, "the Muslins" were looking for her brother, and (4) the status of Lonnie Dawson, appellant's companion, as president of "Black Incorporated."

Additionally, the prosecutor unfairly criticized the witness's version of why she arrived at the Unusual Gift Store when she said she did. The prosecutor and Williams had engaged in the following exchange:

"Q. You could remember that this happened about 12:15 or thereabouts; is that right?

A. I told you I'd been there at 12:00 o'clock. I was running late. It was a bad time of the month. I wasn't feeling well. I was running late. I had to be back for my son by 1:00, and I was saying to my daughter, 'I'll be running late.' I was fifteen or twenty minutes late, or something like that.

Q. You don't know what time it was, then, do you?

A. I was due there at 12:00. I know I was fifteen or twenty minutes late.

Q. What did you do that morning?

A. The whole morning?

Q. Yes.

A. I was in home -- at home in bed that morning.

Q. You were what?

A. I was home. It was a bad time of the month for me. I wasn't feeling good. I was home."

Gratuitiously and prejudically, the prosecutor then stated:

> "Do you mean to tell me it was a bad time of the month because you have no one to corroborate the fact that you were home that morning; isn't that right? That's why it was a bad time of the month."

Defense counsel's immediate objection was sustained.

The prosecutor also improperly returned his inquiry to questions relating to the witness's mother despite the fact that the trial court had previously sustained defense objection to this line of questioning. The following exchange, including a rebuke from the trial court, appears:

"Q. Where is your mother now, by the way?

MR. DENKER [(defense counsel)]: Objection to the relevancy.

THE COURT: If she knows.

MR. DE SIMONE [(prosecutor)]: If she knows. It will be relevant, Judge.

A. At this moment I do not know.

Q. Where is she living?

A. (Pause)

Q. Is that a difficult question where your mother lives?

MR. DENKER: Obviously, Your Honor --

THE COURT: Yes. Counsel, just ask the question. Don't make comments.

A. 3518 North 23rd.

Q. And your father?

A. Atlantic City. 130 Atlantic Avenue.

Q. Now, your mother is not selling drugs now, is she?

MR. DENKER: Now, Your Honor --

THE COURT: Objection sustained.

MR. DENKER: Your Honor, this goes to -- what kind of a question is that?

THE COURT: Objection sustained, counsel.

Q. How about you?

A. My mother worked every day. She's always worked. She's never sold drugs.

Q. She loved her son, didn't she?

A. She gave birth to him.

Q. She won't come down here in court; isn't that right?

MR. DENKER: Objection. How does she know?

THE COURT: Mr. DeSimone, I've already sustained an objection to that line of questioning.

Q. This is the trial for your --

MR. DENKER: What is this, Your Honor?

Q. This is the trial for the death of your brother; isn't that right?

MR. DENKER: Your Honor, I object to this tactic.

THE COURT: I haven't heard the question.

Q. Isn't that right? Your brother got killed; isn't that right? This is the trial for him.

A. Yeah.

Q. Where are the members of your family?

MR. DENKER: What has that got to do with this case?

THE COURT: Just a moment.

MR. DENKER: Objection.

THE COURT: Objection sustained."

The prosecutor's misconduct in questioning Williams continued even after redirect examination. On redirect of Williams, defense counsel had sought to clarify that Williams had not seen

Elaine Vinyard, proprietor of the Unusual Gift Store, when Williams had dropped off the package of coins. On re-cross, however, the prosecutor ignored the narrow scope of this redirect testimony and asked:

"Q. Ma'am, are you aware that Elaine Vinyard posted bail for Roy Hoskins? Are you aware of that since you are close to Elaine Vinyard? You do have business dealings with her.

MR. DENKER: Objection.

THE COURT: Objection sustained.

MR. DENKER: I move that it be stricken.

THE COURT: Objection sustained. Counsel, she said she didn't see Elaine Vinyard with Mr. Hoskins on the date of the incident.

Q. She owns -- Elaine Vinyard owns the Unusual Gifts Shop; isn't that right?

Why are you looking over there for?

MR. DENKER: I object.

THE COURT: Yes.

MR. DENKER: I object.

THE COURT: Objection sustained. Just ask the question."

Appellant then testified on his own behalf.

Appellant stated that, on the day in question, he went to the Unusual Gift Store at about 11:30 a.m. Appellant claimed that he was interested in seeing the owner, Elaine Vinyard, about opening a similar store featuring certain telephones sold at the gift store. According to appellant, however, Vinyard was not at the store. Appellant testified that, as he waited for Vinyard, Williams arrived at the gift store at about 12:15 p.m., leaving a package with appellant. Appellant additionally claimed that Lonnie Dawson, one of the persons arrested along with appellant, appeared at the store driving the Cadillac owned by Tilghman, in which he, appellant, and Rhone were eventually stopped. Appellant stated that he asked Dawson to take him home. According to appellant, Dawson agreed and the two left. After a brief stop to visit a friend of Dawson's, they proceeded to appellant's house by way of the expressway. There, appellant was stopped and taken into police custody.

Appellant stated that he had known the vic-

tim, for "[a]bout three, four years" on a social basis, but added that he had no business dealings with him and did not know whether the victim had been involved in drug traffic. Appellant testified that he, as well as several other people, had driven Tilghman's Cadillac, as he and Dawson worked for Tilghman as sales clerks. Appellant denied that he knew the victim's religious beliefs. He also denied being on Bayard Street, except when taken there by police after his arrest.

As with the previous defense witness, the prosecutor pursued several lines of inquiry which prompted defense objection. The prosecutor began his cross-examination by asking appellant if he was a Muslim, affiliated with the "Temple Twelve." The court overruled defense counsel's objection on the basis of the prosecutor's assertion that appellant's religious affiliation was relevant. The court, however, directed defense counsel to renew the motion if the prosecutor did not subsequently establish relevancy. Even though he continued with this

line of questioning and obtained an affirmative answer from appellant, the prosecutor made no effort to establish the relevancy of appellant's religious affiliation.

The prosecutor then asked appellant the questions concerning Robert Blair, alleged common-law husband of alibi witness Rene Williams, which formed the basis of this Court's holding on direct appeal that a mistrial should have been granted. The following exchange occurred:

"Q. And you know that Robert Blair is in the drug business, don't you? Don't you?

A. No, I don't.

MR. DENKER: Objection.

THE COURT: Yes.

MR. DENKER: I move that be stricken and move for a mistrial.

THE COURT: Objection sustained.

MR. DE SIMONE: Judge --

MR. DENKER: I move for a mistrial.

THE COURT: Objection sustained. It shall be stricken. The jury will disregard it."

The prosecutorial misconduct continued as

the prosecutor sought to inject the fact that appellant's boyhood friend, the son of appellant's employer Calvin Tilghman, had been killed. After confirming that the son had been a good friend of appellant's, the prosecutor, on cross-examination, told appellant, "Tell the jury what happed to him, your good friend." Defense counsel immediately objected, stating that the matter was wholly irrelevant. The court sustained the defense objection. Nonetheless, the prosecutor persisted with the irrelevant matter. This exchange followed:

> " MR. DE SIMONE: Well, Judge, it is relevant.
>
> THE COURT: It is sustained.
>
> Q. Well, he was killed, wasn't he?
>
> MR. DENKER: Objection.
>
> THE COURT: Who? I don't know who 'he' is.
>
> Q. Calvin Tilghman's son was killed.
>
> THE COURT: Objection sustained to the question.
>
> MR. DE SIMONE: Judge --
>
> THE COURT: The jury will disregard it. We are trying one case.

MR. DE SIMONE: We are, Judge. It might be relevant as to why Calvin Tilghman's son was killed.

THE COURT: When I sustain an objection you will not ask other questions in that area."

II

There can be no question that this record reveals an alarming level of prosecutorial misconduct. Throughout cross-examination of appellant's alibi witness, the victim's sister, as well as the cross-examination of appellant, the prosecutor continually sought to direct the jury's attention to inflammatory matters wholly irrelevant to the Commonwealth's cause. At times the prosecutor did so despite specific rulings of the trial court previously forbidding inquiry into the areas pursued.

Such persistent misconduct is especially troubling, for it should have been clear to the prosecutor that such misconduct has not place in the courtroom. "In advocating the cause for this Commonwealth, prosecutors are to seek justice, not only convictions." Commonwealth v.

Cherry, 474 Pa. 295, 301, 378 A.2d 800, 803 (1977). See also American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function §1.1 (Approved Draft, 1971); Pa. S.Ct. Code of Professional Responsibility EC 7-13 (1974). As the Supreme Court of the United States long ago made clear,

> "[a prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is an compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935). Accord, Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2893 (1979).

The consequences of a prosecutor's misconduct are many. Where, as here, prosecutorial misconduct has caused one trial to be set aside,

there is a needless strain on already scarce professional and judicial resources. It is equally evident that swift and certain enforcement of the law had been frustrated.

Moreover, because appellant's jury trial was set aside as a result of prosecutorial misconduct, there is implicated the basic mandate of our system of criminal justice that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Accord, Pa.Const., art.I, § 10; Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854 (1974). The Supreme Court frequently has explained:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223 (1957). Accord, United States v.

DiFrancesco, __U.S.__, __S.Ct.__ (1980).

Although it is generally true that the double jeopardy clause will not bar retrial where a defendant obtains a new trial by way of a request for a mistrial, see, e.g., United States v. DiFrancesco, supra, and Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141 (1977), retrial will be barred where the defense requests a mistrial and obtains relief as a result of prosecutorial "overreaching." Recently, in Commonwealth v. Starks, this Court identified those circumstances in which there exists prosecutorial "overreaching" barring retrial:

> "The United States Supreme Court has enunciated principally two types of prosecutorial overreaching. First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. See also United States v. Dinitz, [424 U.S. 600, 611, 96 S.Ct. 1075, 1081 (1976)]. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. See Lee v. United States, supra at 32, 97 S.Ct. at 2147; United States v. Dinitz, supra at 611, 96 S.Ct. at 1081-1082. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the

> judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against."

__Pa.__, __, 416 A.2d 498, 501 (1980).

Here a record of overreaching is manifest. Apart from the sheer volume of instances where on cross-examination the prosecutor, in the words of the Supreme Court, "struck foul blows," it is evident that, at the time of the repeated misconduct, the Commonwealth's case was quite fragile. Even before the accused sought to present his alibi defense, supported by the sister of the victim, the Commonwealth's case had already been weakened by both the suppression of statements obtained while appeallant was beaten by a police officer and the inability of the Commonwealth's sole eyewitness to identify appellant. The circumstantial proof which remained, primarily resting on the testimony of three persons placing appellant at or near the scene before the killing, had been undermined by defense counsel's cross-examination pointing out serious flaws in the Commonwealth witnesses'

identification testimony. Faced with this fragile case, the prosecutor's response was to engage in repeated acts of misconduct. This misconduct included gratuitous and prejudicial remarks in questioning the victim's sister. It included an inquiry concerning the accused's religious affiliation which, despite his representations of relevancy, the prosecutor never sought to justify. Most revealing, the misconduct also included attempts to repeat questions to which the trial court had already sustained defense objection.

With unmistakable clarity, the prosecutorial misconduct here signals, in the words of Starks, "the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against." On this record the defense request for a mistrial falls outside the general rule that mistrial is not barred where a defendant obtains a new trial by way of a mistrial request. See United States v. DiFrancesco, supra, and United States v. Dinitz, supra. The sole

remedy for the intolerable level of misconduct demonstrated on this record is to direct dismissal of the indictments.

Mr. Chief Justice O'Brien and Mr. Justice Flaherty join this Opinion in Support of Reversal.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PA	:	No. 80-3-361
	:	
	:	Appeal from the Order of
	:	the Court of Common Pleas
	:	of Philadelphia Criminal
V.	:	Trial Division, at Nos.
	:	2753, 2754 and 2755 Nov-
	:	ember Term, 1975, dated
	:	December 17, 1979
WILLIAM HOSKINS,	:	
Appellant	:	ARGUED: October 23, 1980.

OPINION IN SUPPORT OF AFFIRMANCE

KAUFFMAN, J.

The Opinion in Support of Reversal implies that the Commonwealth resorted to prejudicial and inflammatory tactics in order to compensate for deficiencies in what was otherwise a vague, weak circumstantial case. Nothing could be further from the truth. On direct appeal of the original jury verdict, Commonwealth v. Hoskins, 485 Pa. 542, 403 A.2d 521 (1979), we carefully reviewed the prosecution's circumstantial evidence and unequivocally held it sufficient to sustain a conviction for murder of the first degree. The Opinion in Support of Reversal reveals but a

fraction of that evidence.

That the prosecutor employed improper tactics is unquestionable; indeed, that was the very reason we held that a mistrial was appropriate. Although appellant certainly is entitled to a new trial, he is not entitled to a discharge unless the mistrial were deliberately provoked or the prosecutor acted in bad faith. Commonwealth v. Starks, __Pa.__, 416 A.2d 498 (1980). There is no accusation here of deliberate provocation and under all the circumstances of this case, I do not believe that bad faith has been shown.

Accordingly, I would affirm the order below.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PA	:	No. 80-3-361
	:	
	:	Appeal from the Order
	:	of the Court of Common
	:	Pleas of Philadelphia,
V.	:	Criminal Trial Division,
	:	at Nos. 2753, 2754 and
	:	2755 November Term,
	:	1975, dated December
	:	17, 1979.
WILLIAM HOSKINS,	:	
Appellant	:	ARGUED: October 23, 1980

OPINION IN SUPPORT OF AFFIRMANCE

NIX, J.

On numerous occasions, I have expressed my disagreement with the Court's use of a double jeopardy analysis in cases such as the one before the bar of the Court. Commonwealth v. Starks, __Pa.__, 416 A.2d 498, 591 (1980)(Nix, J., Opinion in Support of Reversal). In this case the jury reached a verdict. Because of the presently complained of conduct on the part of the prosecution, this Court on direct appeal granted appellant a new trial, Commonwealth v. William Hoskins, 485 Pa. 542, 403 A.2d 521 (1979).

Now on an interlocutory appeal, see Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977), prior to the commencement of the new trial that was awarded, some members of this Court urge that we find a double jeopardy violation and preclude further prosecution for this heinous murder. Commonwealth v. Hoskins, __Pa.__, __ A.2d__, (1980) (Opinion in Support of Reversal). In my judgment, such a position is legally untenable and would permit a grave travesty upon justice. Prosecutorial misconduct may reach the point where due process would require the foreclosure of a subsequent trial for the same charges, however, such a point has not been reached in this case and the remedy of the award of the new trial adequately protected appellant from the prosecutorial misconduct that has been cited.

The error of the members of this Court in support of reversal stems from this Court's persistent refusal to recognize that prosecutorial misconduct is generally a due process concern and not a matter of double jeopardy. This con-

fusion arises from the misreading of U.S. V. Dinitz, 424 U.S. 60, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). See Commonwealth v. Potter, 478 Pa. 261, 386 A.2d 918 (1978) (Opinion in Support of Affirmance). In Dinitz prosecutorial misconduct became important in a double jeopardy context where that conduct prevented the tribunal from reaching a verdict. The finality of the adjudicative process is a double jeopardy concern. The fact of the prosecutorial misconduct was significant in Dinitz only because it occasioned the interruption of the trial. In contradistinction, due process is concerned with the fairness of the proceedings and trial error such as prosecutorial misconduct strikes at the very heart of the fairness and impartiality of the proceeding.(1)

This distinction is much more than a quibble over the appropriate analysis to address a specific wrong. Because double jeopardy has at its heart the concept of finality, the remedy for a violation thereof precludes further prosecution. On the other hand, where the asserted

error relates to the fairness of the initial proceeding, in most instances, adequate relief can be given by providing the opportunity for a second trial free of that error. Here we are concerned with trial error which affected the fairness of the trial. Appellant received the full remedy to which he was entitled when he was awarded a new trial. The Opinion in Support of Reversal's gratuitous grant of the greater remedy of discharge is not necessitated by the nature of the harm and abandons the societal interest in just determination in criminal matters.

Therefore, I would affirm the order of the lower court denying appellant's motion to dismiss.

FOOTNOTE

(1) Pertinent to the instant inquiry, we stated in Commonwealth v. Hogan, 482 Pa. 333, 340, 393 A.2d 1133, 1136 (1978):

> Lastly, the double jeopardy clause should be strictly construed by reference to its historical purposes, as outlined above. Although "[t]hese historical purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions...the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judg-

ment." United States v. Scott, supra, 437 U.S. at 82, 87, 98 S.Ct. at 2192, 57 L.Ed. 2d at 72, 74. Thus, "a provision like that of double jeopardy...is rooted in history and is not an evolving concept like that of due process." Gore v. United States, 357 U.S. 386, 392, 78 S.Ct. 1280, 1284, 2 L.Ed.2d 1405 (1958).

Appellant seeks to buttress his argument by relying upon Mr. Justice POMEROY's Opinion in Support of Affirmance in Commonwealth v. Potter, 478 Pa. 251, 386 A.2d 918 (1978). Potter was affirmed per curiam by an equally divided court. Mr. Justice POMEROY wrote that the same double jeopardy considerations that apply to mistrials caused by prosecutorial misconduct should also apply to the double jeopardy analysis where the defendant's appeal has won for him a new trial due to prosecutorial misconduct. He based his view on his belief that "the applicability of double jeopardy analysis is not dependent on nice procedural distinctions." Id. 478 Pa. at 259, 386 A.2d at 921.

However, as we have previously mentioned, mistrials present a distinctly different consideration because the right of the accused to have judgment passed upon by the empanelled tribunal has been frustrated. Such is not the case where the verdict has been rendered and is set aside at the behest of the defendant upon a finding of trial error. The very core of the protection offered by the double jeopardy clause is the assurance of an adjudication by a tribunal having jurisdiction to hear and determine the cause and the finality of that judgment. United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916). Thus, mistrials touch upon the very heart of double jeopardy protection since, in those cases, the original tribunal is prevented from passing judgment.

After the tribunal has reached a verdict an altogether different situation is presented when the defendant appeals his conviction and seeks a new trial. In those circumstances it is clear that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict,...poses no bar to further prosecution on the same charge." United States v. Scott, supra, 437 U.S. at 90, 98 S.Ct. at 2193, 57 L.Ed.2d at 74. In sum, the distinction between a mistrial and a retrial following a successful appeal is more than mere procedure. Instead, it is rooted in the historical purposes of the double jeopardy clause.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOSKINS, Petitioner	:	CIVIL ACTION
JULIUS T. CUYLER, Superintendent of the State Correctional Institution at Graterford	:	
and	:	
THE ATTORNEY GENERAL OF PENNSYLVANIA	:	No. 81-1169

O R D E R

DONALD W. VAN ARTSDALEN, J.

AND NOW, this 8th day of May, 1981, after careful and independent consideration of Relator's Petition for a Writ of Habeas Corpus and after review of the Report and Recommendation of United States Magistrate Peter B. Scuderi, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. Relator's Petition for a Writ of Habeas Corpus is DENIED. There is probable cause for appeal.

APPENDIX "C"

BY THE COURT:

/s/
DONALD W. VAN ARTSDALEN, J.

ENTERED: 5-11-81

CLERK OF THE COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOSKINS, Petitioner	:	CIVIL ACTION
v.	:	
JULIUS T. CUYLER, Superintendant of the State Correctional Institution at Graterford	:	
and	:	
THE ATTORNEY GENERAL OF PENNSYLVANIA	:	No. 81-1169

REPORT AND RECOMMENDATION

PETER B. SCUDERI
UNITED STATES MAGISTRATE

FACTS

Mr. Hoskins petitions this Court for habeas corpus relief pursuant to 28 U.S.C. §2254. Presently, he is out on bail pending a new trial in the Philadelphia County Court of Common Pleas, on charges of first degree murder, possessing instruments of crime, possessing prohibited offensive weapons and criminal conspiracy. He bases his Petition on a challenge to the con-

stitutionality of a second trial, asserting a retrial would constitute double jeopardy, this violating his fifth amendment rights.

On November 18, 1976, Hoskins received a sentence of life imprisonment, after being convicted on the previously mentioned charges. On appeal of that conviction, the Pennsylvania Supreme Court reversed, ordering a new trial. Commonwealth v. Hoskins, 485 Pa. 542, 430 A.2d 521 (1979). The Court found that Defendant's Motion for a Mistrial should have been granted due to prosecutorial misconduct.

Hoskins then made a pretrial motion in the Philadelphia Court of Common Pleas to dismiss the indictment on the grounds of double jeopardy. Following an evidentiary hearing, the motion was denied on December 17, 1979. The denial was appealed to the Pennsylvania Supreme Court which affirmed, February 4, 1981.[1] An application for reargument was denied on March 13, 1981. Since

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[1] The Order was affirmed by an equally divided Court: Justices Nix, Kauffman and Larsen in favor of affirmance, and Justice Roberts, Flaherty and Chief Justice O'Brien in support of reversal.

the issue of double jeopardy has been presented to the highest state court, the Petitioner has exhausted his available state remedies and the Petition is ripe for decision.

Petitioner then applied to this Court for a Stay of State Court Proceedings pursuant to 28 U.S.C. 2251. I recommended to Judge Van Artsdalen that the stay be granted. The Court, however, reserved decision on that application pending the submission of this Report and Recommendation. The State Court placed Hoskin's case in the "Ready Pool" for May 13, 1981. I received the state record on May 4, 1981 which narrowly provided the necessary time to prepare this Report and Recommendation.

DISCUSSION

The significance of double jeopardy protection is well established. In Green v. United States, 355 U.S. 187 (1957), Justice Black set out the jurisprudential foundation for this fifth amendment clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American

> system of jurisprudence, is that the state with all its resources and power should not be able to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

As fundamental as double jeopardy protection is to our system of justice, its application is equally confusing. No other constitutional provision has engendered the same degree of uncertainty.[2]

The United States Supreme Court first implied that the double jeopardy clause of the fifth amendment would bar further prosecution for official misconduct in United States v. Tateo, 377 U.S. 463, 468 n.3 (1964); United States v. Jorn, 400 U.S. 470, 475 n.12 (1971). The dictum suggests that where the "impropriety /is/ designed to avoid an acquittal, a further trial would be barred." Id.

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[2] Schulhofer, Jeopardy and Mistrials, 125 U. Pa. L. Rev. 449 (1977); 18 Duq. L. Rev. 103 n. 4 (1979). "In fashioning applicable standards in this area, courts have often created distinctions that border on the imperceptible, and the area is replete with subtle anomalies."

Although not directly on point, the Supreme Court has recently issued a number of double jeopardy opinions. These decisions are instructive to the extent that they demonstrate the Burger Court's willingness to find the state's prosecution interest as outweighing the defendant's double jeopardy protection.[3] In addition, they confirm the dictum of Tateo and Jorn, supra. But since the Supreme Court has never actually barred reprosecution for prosecutorial misconduct, it is not precisely clear what the Court would construe to constitute that level of misbehavior defined in these opinions.

However, what is clear is the Third Circuit standard announced in U.S. v. Leppo, 641 F.2d 149 (3d Cir. 1981). In that case, a mistrial was declared based on a government agent's testimony that the defendant had refused to answer certain questions. The Court found no

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[3] United States v. Di Francesco, __U.S. __, 101 S.Ct. 426 (1981); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458 (1973). (See also United States v. Morrison, __U.S.__, 101 S.Ct. 665 (1981) where the Court allows reprosecution despite federal agents violation of defendant's sixth amendment rights.)

double jeopardy bar to a new trial and stated:

> The standard to be applied in determining whether the Double Jeopardy Clause bars a retrial after defendant seeks and obtains a mistrial is not gross negligence or recklessness but rather whether the government intended to provide mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.4 U.S. v. Leppo, supra, 152, quoting U.S. v. Dinitz, supra, 424.

Having established the relevant standard, this test must be applied to the facts before us. There is no doubt that a tremendous burden is placed on the Petitioner. Only very extreme circumstances would demonstrate the

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4 This passage should remove any doubts as to the standard to be applied which are raised by Government of the Virgin Islands v. Scuito, 623 F.2d 689 (3d Cir. 1980) or United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976).

I agree with petitioner that the standard is the same here where there is a reversal of conviction after a motion for mistrial has been denied. United States v. Rios, 637 F.2d 728, 729 (10th Cir. 1980).

required prosecutorial state of mind.[5] Despite the alleged weaknesses of the standars (see n.5 supra), it is the law.

The prosecutor's conduct in this case is not to be condoned. In their decision which reversed Hoskin's conviction, the Pennsylvania Supreme Court characterized the prosecutor's behavior as improper and inflammatory. Commonwealth v. Hoskins, 485 Pa. 542, 403 A.2d 521 (1979). I agree. The District Attorney posed questions to the alibi witness and to the defendant concerning "drug trafficking" and the "Muslim religion" which would have had an inflammatory effect on the jury. Although that Court reversed on the basis on this behavior, they also unanimously agreed that the evidence at trial was sufficient to sustain the murder conviction. After reviewing the record in this case, I also find significant evidence implicating

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[5] For this reason, the standard has been criticized, from a practical standpoint, as impossible to satisfy absent an admission from the prosecutor. 18 Duq. L. Rev. 103, 120 and also for being indistinquishable from simply an intent to prejudice the jury. United States v. Roberts, 640 F.2d 225, 229-230 (9th Cir. 1981) Norris, J. dissenting).

Hoskins. This was relevance to my review of Petitioner's double jeopardy claim.[6]

If the Commonwealth's case was very weak, with little to no hope of prevailing with the jury, it would be easier to infer the requisite intent of the prosecutor. However, given the posture of the Commonwealth's case, at the time in question, the District Attorney was not in a desperate situation. If he had been, there would be a stronger case for arguing that he intentionally sought a mistrial.

Based on recent United States Supreme Court Double Jeopardy opinions, it seems clear that the Court is reluctant to ban a second trial for criminal defendants (see n. 3 and accompanying text, supra). The same theme is articulated in

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[6] See "Opinion in Support of Affirmance" Pennsylvania Supreme Court, Kauffman, J. "The Opinion in Support of Reversal implies that the Commonwealth resorted to prejudicial and inflammatory tactics in order to compensate for deficiencies in what was otherwise a vague, weak and circumstantial case. Nothing could be further from the truth. On direct appeal...we carefully reviewed the prosecution's circumstantial evidence and unequivocally held it sufficient to sustain a conviction..."

a recent Sixth Amendment unanimous decision, United States v. Morrison, supra.

> "Our approach has thus been to identify and then neutralize the taint by tailoring suitable relief appropriate in the circumstances."

That opinion cites the general rule that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."

Based on U.S. v. Leppo, supra and the consistently repeated direction of the U.S. Supreme Court (see n.3 and the accompanying text), it is clear that only under extreme circumstances will prosecutorial misconduct preclude a second trial. I do not find those circumstances to exist here. A second trial provides a sufficient remedy to ensure the protection of this defendant's constitutional rights while safeguarding the public's interest in convicting those who have broken the law.

THEREFORE, this United States Magistrate makes the following

R E C O M M E N D A T I O N

AND NOW, this 8th day of May, 1981, IT IS RESPECTFULLY RECOMMENDED that Relator's Petition for a Writ of Habeas Corpus be DENIED. There is probable cause for appeal.

/s/
PETER B. SCUDERI
UNITED STATES MAGISTRATE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-1732

HOSKINS, WILLIAM,

Appellant

V.

JULIUS T. CUYLER, SUPT.; ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 81-1169)

Submitted Under Third Circuit Rule 12(6)
December 1, 1981
Before: ALDISERT, ROSENN and WEIS, Circuit Judges.

Judgment Order

After considering the contentions raised by appellant, to-wit, that where appellant's conviction has been reversed by the Supreme Court of Pennsylvania due to intentional misconduct by the prosecution and the trial record reveals prolonged intentional misconduct, overreaching and disregard for rulings of the trial

judge by the prosecution, all aimed at creating an extremely prejudicial trial atmosphere, double jeopardy should preclude a retrial; and for the reasons set forth in the Report and Recommendation of United States Magistrate Peter B. Scuderi, approved and adopted by Order of the district court, Hoskins v. Cuyler, Civ. No. 81-1169 (E.D.Pa. May 11, 1981), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ J. Aldisert
Circuit Judge

Attest:

/s/
Sally Mrvos, Clerk
DATED: Dec 1, 1981

Opposition

Supreme Court, U.S.
FILED
APR 8 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER, 1981

NO. 81-1414

WILLIAM HOSKINS, Petitioner

v.

JULIUS T. CUYLER, Superintendent,
and ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA, Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

ERIC B. HENSON
Deputy District Attorney
(Counsel of Record)
KENNETH S. GALLANT
Assistant District Attorney
PAUL S. DIAMOND
Assistant District Attorney
EDWARD G. RENDELL
District Attorney

1300 Chestnut St.
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April 8, 1982

QUESTION PRESENTED

Should this Court grant certiorari to review the factual findings of the state and federal courts that the prosecutor at petitioner's murder trial did not misconduct himself intending to cause a mistrial?

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OPINION BELOW

The order of the United States Court of Appeals for the Third Circuit is reproduced as Part E of petitioner's Appendix.

JURISDICTION

Petitioner seeks review by a writ of certiorari pursuant to 28 U.S.C. §1254(1). Although it is conceded that this Court has jurisdiction to consider this petition, respondents believe this is not an appropriate case for the exercise of this Court's discretionary certiorari jurisdiction, for reasons stated below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V (set forth in relevant part in Petition for Certiorari at 2-3)

28 U.S.C. §2254(d) (set forth in Appendix A to this brief)

STATEMENT OF THE CASE

In 1976, after a jury trial in Philadelphia, petitioner William Hoskins was convicted of first degree murder and related offenses for his part in the 1975 assassination of Hershell Williams. Three years later, the Supreme Court of Pennsylvania held that although the trial evidence supported defendant's convictions, a new trial was warranted because one of the questions asked by the prosecutor at trial was unduly inflammatory. Commonwealth v. Hoskins (I), 485 Pa. 542, 546-56, 403 A.2d 521, 523-28 (1979).

The trial evidence showed that on November 4, 1975, petitioner, Lonnie Dawson, and Joseph Rhone waited for the decedent outside his home and repeatedly shot him when he came out with his two small children. The Commonwealth offered evidence through its cross-examination of petitioner and his alibi witness intending

to show that the decedent was killed in a violent struggle over the drug dealing activities of members of Black Muslim Temple Number Twelve in North Philadelphia. Petitioner did not properly object to most of this evidence. The Pennsylvania Supreme Court nonetheless reversed petitioner's convictions because it found one cross-examination question inflammatory.

The Court also feared that the jury might be "inflamed" by references to the Muslim faith "because of some of its follower's [sic] involvement in criminal activity." Id., 485 Pa. at 551 n.10, 403 A.2d at 526 n.10.

Upon remand, petitioner moved to dismiss the charges against him on double jeopardy grounds. The Honorable Paul Ribner of the Philadelphia Court of Common Pleas denied this petition, specifically finding (1) no "indication on the record that the objectionable questions by the prosecutor

were efforts to force defendant's counsel to move for mistrial . . .," and (2) "absolutely no basis to infer prosecutor misconduct which would justify imposing a bar to retrial." Petitioner's Appendix, Part A. An equally divided Pennsylvania Supreme Court affirmed Judge Ribner's order and findings. Commonwealth v. Hoskins (II), 432 A.2d 149 (Pa. 1981); Petitioner's Appendix, Part B. Significantly, none of the justices found that the trial prosecutor misconducted himself intending to cause the petitioner to seek a mistrial.

Petitioner, through counsel, then petitioned the United States District Court for the Eastern District of Pennsylvania for a writ of habeas corpus, again contending that the prosecutor's improper questioning barred his retrial on double jeopardy grounds. Magistrate Peter B. Scuderi determined that

the record showed no intent on the part of the prosecutor to cause a mistrial. Petitioner's Appendix, Part D. The Honorable Donald W. Van Artsdalen of the District Court approved and adopted the Magistrate's Report and Recommendation and denied habeas relief. Petitioner's Appendix, Part C. The Third Circuit affirmed the District Court. Petitioner's Appendix, Part E. Petitioner now asks this Court to grant certiorari to review the thrice made factual finding that the trial prosecutor's "improper" question was not intended to cause a mistrial.[1]

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[1] On April 5, 1982, petitioner and his co-defendant in the Williams murder trial, Lonnie Dawson, were arrested and charged with drug-related crimes, stemming from their attempted murder of an FBI informant. United States v. Hoskins and Dawson, No. 82-0325-M (E.D. Pa.). Plainly, the people of Pennsylvania are entitled to a speedy disposition of this petition so that they may reprosecute petitioner for his earlier drug-related crimes.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

This Court's review of the factual issue presented here is unwarranted. The state and federal courts correctly found that the prosecutor below did not intentionally seek a mistrial when he "improperly" proved petitioner's homicidal motives. Accordingly, no reasons exist for granting certiorari: (1) the sole issue presented is simple and factual; (2) the state court's factual findings which resolve this issue are amply supported and, hence, correct and binding; (3) the federal courts' findings are similarly supported and correct; (4) most of petitioner's present objections were waived at trial under Pennsylvania law.

Should this Court grant review only to make new factual findings, they would be

identical to those made below, that the prosecutor had produced compelling evidence of petitioner's guilt and did not intentionally misconduct himself. Thus, this Court, like the lower courts, would also rule that the people of Pennsylvania may again prosecute petitioner for a brutal and horrifying murder.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI TO REDETERMINE FACTUAL ISSUES PROPERLY RESOLVED AGAINST PETITIONER IN THE STATE AND FEDERAL COURTS.

Petitioner seeks this Court's review of his thrice rejected factual allegation that during his 1976 trial, the prosecutor intentionally sought a mistrial when he asked a question that three years later the Pennsylvania Supreme Court determined was improper. Petitioner further contends that the attendant "harassment" and "prejudice" create a double jeopardy bar to his reprosecution for first degree murder (Petition for Certiorari 28, 30).

Remarkably, petitioner did not object to most of the "misconduct" at trial, nor move for a mistrial -- as required under Pennsylvania law -- when his objections were sustained. Commonwealth v. Clair, 458 Pa.

418, 326 A.2d 272 (1974); Commonwealth v. Brown, 467 Pa. 512, 517, 359 A.2d 393, 395 (1976). The Pennsylvania Supreme Court based its reversal on one "improper" question the trial prosecutor asked petitioner on cross-examination. The federal and state courts have repeatedly found that this "misconduct" was not intended to provoke a mistrial. The nation's highest court should not review that amply supported factual finding: "This Court cannot undertake to review concurrent findings of fact by two [much less three] courts below in the absence of any obvious and exceptional showing of error." Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967) (bracketed material added). Moreover, this Court recently stressed that the state court factual findings regarding a witness' mental state bind the federal

courts on habeas review. Sumner v. Mata (II), 50 U.S.L.W. 3760 (March 22, 1982). Those findings are unquestionably final here as petitioner, who has been counselled throughout these proceedings, does not allege any reason why the state court factfinding process was unfair, or any reason cognizable under 28 U.S.C. §2254(d) why these findings may be disregarded.[2] Sumner v. Mata(I), 449 U.S. 539 (1981); see Cuyler v. Sullivan, 446 U.S. 335 (1980).

This is not surprising since the state court findings are entirely reasonable. The Philadelphia Court of Common Pleas, the state court of original jurisdiction,

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[2]Findings of fact made by a federal court reviewing a state court record are as binding as findings made upon viewing live witnesses. Sumner v. Mata (I), supra. This is particularly true where, as here, the moving party offered no testimony.

specifically found there was no "indication on the record that the objectionable questions by the prosecutor were efforts to force defendant's counsel to move for a mistrial." Opinion, Ribner, J. at 3. The Court also found "absolutely no basis to infer prosecutor misconduct which would justify imposing a bar to retrial." Thus the court necessarily found that the prosecutor did not intend to harass or prejudice defendant, because under controlling Pennsylvania decisional law cited by that court, this type of intentional conduct would bar retrial. Commonwealth v. Gravely, 486 Pa. 194, 200-01, 404 A.2d 1296, 1298-99 (1979) (cited by Judge Ribner). Accord Commonwealth v. Starks, 490 Pa. 336, 340-42, 416 A.2d 498, 501 (1980). In these circumstances, the state court findings as to the prosecutor's intent are pure findings of

fact binding under §2254(d). Sumner v. Mata (II), 50 U.S.L.W. at 3761 (issues of mental state are issues of fact); see Cuyler v. Sullivan, 446 U.S. at 341-42.[3] Surely this Court need not now review this binding, repeatedly made, and amply supported factual finding.

Similarly, should this Court choose to disregard the state court factfindings, granting certiorari would allow only a review of the District Court's factual finding, approved by the Court of Appeals,

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[3]Under Pennsylvania law these remain the state courts' findings of fact. Commonwealth v. Holly, 483 Pa. 371, 375, 396 A.2d 1215, 1218 (1979) (findings of fact made by Common Pleas Court and affirmed by equally divided Supreme Court on direct appeal are binding on collateral attack, although conclusions of law drawn therefrom are not). Importantly, no justice of the Pennsylvania Supreme Court disagreed with the finding that the prosecutor did not intend to abort petitioner's trial.

that the prosecutor did not commit intentional misconduct. Again, this Court's review is hardly warranted. Berenyi v. Immigration Director, supra.

Finally, the record below supports the finding that the prosecutor did not intend to provoke a mistrial. Without question, the lower courts made no "obvious and exceptional . . . error." Id. at 635; Graver Tank Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). The Commonwealth attempted to prove petitioner's homicidal motive: he and the others killed the decedent because of a violent conflict arising from their Muslim-related drug-trafficking activities. Thus, petitioner denied on direct examination that he was aware of the deceased's religion or narcotics dealings (Notes of Testimony, Trial, 4.110,

4.114; R. 79a, 83a).[4] Of course, the prosecutor cross-examined the petitioner on his contradiction of important motive evidence. Petitioner did not object and move for mistrial when most of these questions were asked.

In addition, the decedent's sister, Rene Williams, testified for petitioner as an alibi witness. Given the undue weight that might be accorded Ms. Williams' testimony -- especially since she described her relationship with the decedent as "close" -- it was important to expose the true nature of her relationships to all parties in this matter. Thus, in cross-examining Ms. Williams and the petitioner, the prosecutor

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[4] References to the form R. __a are parallel citations to the reproduced record presented by petitioner to the Third Circuit.

tried to show why Ms. Williams would testify for the man who killed her "close" brother, to show how, like petitioner and her brother, she was caught up in the web of drug activities by members of Muslim Temple Number Twelve. The prosecutor tried to show that Ms. Williams was a Temple Twelve Muslim; that her brother was a Temple Twelve Muslim drug dealer, as was her husband, Robert Blair; that there was bad blood between Blair and the decedent; that she and Blair were petitioner's good friends; that Blair's business "partner," a Ms. Vineyard, posted defendant's bail in 1975; and that Ms. Williams had told the killers when her brother would be most defenseless, at what time he would leave his home with his children. In addition, the prosecutor showed that Ms. Williams claimed not even to know her brother's religion, thus contradicting her testimony

that the two were "close." The prosecutor also showed that her relationship with petitioner caused her to come forward with her alibi only a week before trial. Most of this cross-examination disparaged only the decedent and thus can hardly be said to have prejudiced petitioner (N.T. 4.52-58, 62, 86; R. 21a-27a, 31a, 55a).

Most significantly, petitioner either did not object to the bulk of this cross-examination or did not properly move for a mistrial when he did object. Indeed, the Pennsylvania Supreme Court based its reversal order on one question by the prosecutor regarding Ms. Williams' relationship with Blair. Commonwealth v. Hoskins (I), 485 Pa. at 552; 403 A.2d at 526. This was virtually the only question during the prosecutor's cross-examination of any witness to which petitioner properly objected, thus underscoring the propriety and relevance of the entire

line of questioning. Likewise, petitioner has never contested the relevance or factual basis of the cross-examination. In these circumstances, one might conclude that the reversal of petitioner's convictions was unwise; one cannot reasonably contend that the factual findings allowing his retrial are unsupported.

Petitioner also alleges that the prosecutor made "inflammatory" closing argument. This claim is not cognizable since it was not included in the counselled habeas petition filed below.[5] In any event, the claim is also meritless. During his closing the prosecutor tried to make clear that the web

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[5] Jennings v. Casscles, 568 F.2d 229, 233-34 (2d Cir. 1977); Hill v. Attorney General of United States, 550 F.2d 901 (3d Cir. 1977); Pfeifer v. United States Bureau of Prisons, 615 F.2d 873, 877 n.3 (9th Cir. 1977), cert. denied, 447 U.S. 908 (1980).

of Muslim-related drug dealing caused petitioner to kill Hershell Williams and also caused Rene Williams to testify for her brother's killer. In addition, the prosecutor reminded the jury of the importance and seriousness of its task. Certainly such argument is permissible. See Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[W]e simply do not believe that [the alleged prosecutorial misconduct] made appellant's trial so unfair as to deny him due process.").

Indeed, a fair reading of the prosecutor's entire closing compels the same conclusions as those reached by the lower courts: that no part of the closing was made in bad faith or with the intention of aborting petitioner's trial and that retrial would not violate the federal constitution. Magistrate Scuderi properly found, like the

jury and the Pennsylvania Supreme Court, Commonwealth v. Hoskins (I), supra, that there was a strong circumstantial case against petitioner. He therefore found that the prosecutor would not have a motivation to taint the record or cause a mistrial by deliberate misconduct.

In sum, no reasons exist for granting certiorari: (1) the issue before the Court is simple and factual; (2) the state court findings below are amply supported and hence correct and binding; (3) the federal courts' findings are similarly supported and correct; (4) under Pennsylvania law, petitioner waived the bulk of misconduct claims at trial.[6]

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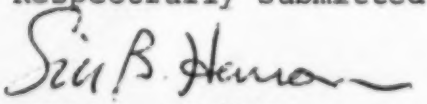
[6]In addition, respondents have contended throughout this litigation that the federal guarantee against double jeopardy does not preclude reprosecution where, as here, a conviction is reversed on appeal for any reason other than the sufficiency of the evidence to support the verdict. United States v. Scott, 437 U.S. 82, 90-91 (1978).

Should this Court grant review only to make new factual findings, they would be identical to those made below, that the prosecutor had produced compelling evidence of petitioner's guilt and did not intentionally misconduct himself. Thus, this Court, like the lower courts, would also rule that the people of Pennsylvania may again prosecute petitioner for murdering Hershell Williams.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,



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Appendix

28 U.S.C. §2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

IN THE SUPREME COURT
OF THE UNITED STATES

WILLIAM HOSKINS, Petitioner	:	OCTOBER 1981
v.	:	
JULIUS T. CUYLER, Superintendent, and ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents	:	NO. 81-1414

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel For Respondents, hereby certify that I have caused a copy of this Brief for Respondents in Opposition to Petition for Certiorari to be served upon counsel for petitioner, Joel Harvey Slomsky, Esquire, 2400 Two Girard Plaza, Philadelphia, Pennsylvania, 19102, by depositing three (3) copies in the United States mail, first class, postage prepaid, on April 8, 1982.

Eric B. Henson

Sworn to and subscribed :

before me this 8th day of :

April, 1982, A.D. :

Dorothy Levin
NOTARY PUBLIC

My Commission Expires: 9/15/82